IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1308

NATIONAL BROADCASTING COMPANY, INC., AND CHRONICLE PUBLISHING CO.,

Petitioners,

vs.

OLIVIA NIEMI, A MINOR, BY AND THROUGH HER GUARDIAN AD LITEM,

Respondent.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT.

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Amicus Curiae, American Library Association (ALA), respectfully requests that the Petition for Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, filed by Petitioners, National Broadcasting Company (NBC) and Chronicle Publishing Co. (Chronicle) be granted. Petitioners NBC and Chronicle and Respondent, Olivia Niemi, have all consented to the filing of this request and brief in support thereof.

IDENTITY OF THE AMERICAN LIBRARY ASSOCIATION.

The American Library Association, founded in 1876, is a non-profit educational organization with its principal place of business in Chicago, Illinois. Its membership includes more than 30,000 libraries, librarians, library trustees and members of the general public who are devoted to the development and improvement of library services in the United States.

The Association is the chief spokesman for the modern library movement in North America and, to a considerable extent, throughout the world. Through its membership and its affiliation with its constituent state library associations, the American Library Association represents over 29,000 public, university, and special libraries, over 90,000 elementary and secondary school libraries and media centers, and over 120,000 librarians.

The American Library Association is an institution unique to American culture and tradition. Through libraries, citizens are provided essentially free access to books, periodicals, magazines, records, microfilms, pamphlets, films, and other materials which they require or desire to satisfy their intellectual, emotional, recreational or professional interests.

In providing this service in the free society mandated by our Constitution, it is and has been the responsibility of libraries to make available books and other materials presenting all points of view concerning the problems, issues and attitudes of the times. Libraries and librarians have, therefore, historically resisted efforts to limit their collections to only those materials reflecting attitudes, ideas, and literary styles bearing the imprimatur of governmental authority or the approval of the prevailing majority of the populace. As a result, the American library has become, in many respects, the nation's most basic First Amendment institution. Indeed, libraries serve as a primary resource for the intellectual freedom required for the preservation of a free society and a creative culture.

INTEREST OF THE AMERICAN LIBRARY ASSOCIATION.

The interest of the ALA in this cause is direct, vital and immediate. Beyond any question, the outcome of this litigation will directly affect book selection and dissemination policies and practices of libraries both in California and throughout the United States. As a consequence, it will largely determine not only the future nature and content of library collections but also the terms and conditions of access to such collections.

Every day libraries and librarians disseminate literally millions of articles, books, phonorecords, photographs, films and audiovisual materials; through interlibrary loan arrangements, materials unavailable in one library collection can be obtained from another library collection; libraries do not and, in many cases legally may not, deny public access to those works in their collection which are desired or needed.

The works in library collections necessarily include works describing or depicting violent and criminal conduct. The history of man since Cain slew Abel is in no small measure a history of crimes against individuals, against families, against nations, and against humanity. Thus, it is inevitable that the records of such history, written and pictorial, are replete with scenes of rapine, murder, and mayhem.

Through the ages even the revered and renowned giants of literature have been recorders of violence and crime. Homer, Shakespeare, Dostoyevsky, Poe, and other authors without number have found the depiction of violence and crime a means of describing reality, or human problems, or moral lessons, or social insights; a means, too, of providing suspense, entertainment, and information.

It is the existence of these works and the creation of future works which is challenged by the theory of negligence advanced by Respondent. If the decision of the Court of Appeal

holding that the distributor of a creative work can be held liable because a person used such work as a pattern for criminal or anti-social behavior, then libraries must close down and education must cease. The evil of the Respondent's position is not merely in its application to violence and crime, but in its easy extension to every form of learning. There is no idea that cannot be perverted; there is no invention which cannot be misused.

It is not possible for librarians, or for that matter any other distributors of creative material, to psychologically screen their patrons to identify those whose latent criminal or anti-social inclinations will be triggered by a book or picture. Since patrons cannot be screened, if distributors of creative works are to be held liable for the effects of the contents of the works they distribute, they can only protect themselves by screening the works themselves. And the screening of such works on such basis is "censorship," plain and simple. Moreover, it is the most insidious form of censorship—self-censorship—which provides no basis for review and hence no means whereby the legal rights of those offended may be vindicated. *Smith* v. *California*, 361 U. S. 147, 154 (1959).

The concern of the American Library Association and its members with the issue here involved is not academic. Libraries are constantly under pressure to purge their collections of works which are deemed "unsuitable" by self-appointed, self-annointed, self-selected, and self-elected arbiters of the public welfare and morality. The addition of potential liability for civil damages to the existing pressures would make those pressures irresistible.

This cannot be permitted to happen if the Freedom of Speech guaranteed by the First Amendment is to have meaning.

ARGUMENT.

I.

Introduction.

The essence of Respondent's theory of liability is that the author, producer, distributor, and all sponsors of a creative work which involves a depiction of violence or crime are responsible in damages for any and all injury caused by any person's criminal response to such work. Such liability would follow even though there was no *scienter* or intent that the work should evoke such response. Such liability would be imposed even though the affirmative intent and the purpose of the work was to discourage such response. Moreover, such liability would arise even though the response is not one which a normal, reasonable person would have.

The net effect of Respondent's theory of liability is to compel the authors, producers, distributors, and sponsors of a creative work to underwrite losses resulting from the criminal conduct of any person whose crime can be said to resemble a scene or theme in such work, real or fictional. Since essentially every criminal act and every form a crime may take has been described in the media at some time, the damages incurred by any victim could readily be attributed to such description.

If, applying Respondent's theory, Petitioners' should have anticipated that an "artificial rape" scene in a work concerned with the social problems of reform school life would prompt a criminal assault on the Respondent, then the media's liability for losses through criminal activity is comprehensive and absolute. Victims of kidnappings, hijackings, bank robberies, extortion, murder, and every other form of violent, antisocial, and criminal behavior could enjoy indemnification if the wrongdoer can merely be persuaded to blame his crime on something he read, or heard, or saw.

The rationale of Respondent's theory involves a view of human behavior, motivation, and response which is completely "reactive"; that is, a belief that whatever man sees, hears, or reads he will do, even if the doing involves antisocial or criminal activity.

Fortunately, the authors of our Constitution did not share this hopeless, cynical, and aboriginal view of man's ability to cope with ideas, concepts, and images. Had they believed in Respondent's "monkey see, monkey do" view of human behavior, they would never have dared adopt the First Amendment.

The First Amendment, guaranteeing the freedom of speech as a fundamental right, is premised on a belief in man's power to reason; on his ability to filter the impressions and images received from whatever source and to determine which may be acted upon in a socially responsible way. To be sure, this belief and reliance on the reasoning power of man can involve risks and dangers of misconduct and disorder where such power is deficient. Yet, freedom of speech is willingly accepted as a well calculated risk because the Founding Fathers knew:

> ". . . that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones." *Whitney* v. *California,* 274 U. S. 352, 375 (1927).

The First Amendment was not designed to protect only that speech which is fit for psychopaths to hear; it was not intended ". . . to reduce the adult population * * * to reading only what is fit for children . . .," *Butler* v. *Michigan,* 352 U. S. 380, 383 (1956), or as in the case at bar, for "delinquent children." It was intended rather to protect and encourage the ". . . unfettered interchange of ideas for the bringing about of political

and social changes desired by the people." *Roth* v. *United States,* 354 U. S. 476, 484 (1957).

The First Amendment is not the product of a paternalistic society which believes that the only way citizens can find their self-interest is to deny them information deemed false or dangerous. *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U. S. 85 (1977). The First Amendment involves a fundamental value judgment that "the fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression." *Whitney, supra,* 274 U. S. at 378. In the words of Mr. Justice Brandeis: ". . . among free men the deterrents ordinarily to be applied to prevent crime are *education* and *punishment* for violation of the law, not abridgment of the rights of free speech and assembly." *Id.,* 274 U. S. at 378 [Emphasis supplied].

II.

Respondent's Theory of Liability Would Unreasonably Chill the Exercise of First Amendment Rights.

This Court has long been concerned with "the hazard of self-censorship of constitutionally protected material . . ." *Mishkin* v. *State of New York,* 383 U. S. 502, 511 (1966). It has recognized that the mere threat of criminal prosecution may be sufficient to prohibit the circulation of constitutionally protected publications. As this Court stated in *Bantam Books* v. *Sullivan,* 372 U. S. 58, 68 (1962).

> "People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around . . ."

As a consequence, this Court has enjoined a number of threats by chiefs of police and prosecutors, *Id.* at 67, n. 8, recognizing that the threat of invoking legal sanctions and other means of

coercion, persuasion, and intimidation were effective but informal means of violating First Amendment rights.

It is the very invisibility of self-censorship to those whose freedoms are denied by it which presents a special hazard. As Mr. Justice Brennan so aptly wrote in *Smith* v. *California, supra,* 361 U. S. at 154:

> "The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered."

But this Court not only has condemned the self-censorship prompted by the threat of criminal prosecution, fine and imprisonment, it has also specifically recognized the inhibitory effect of civil liability on the freedom of speech. In fact, this Court noted in *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 277 (1964) that

> "The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute."

and went on to explain that:

> "Whether or not a newspaper can survive a succession of such judgments [civil], the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment Freedom cannot survive." *Id.* at 278.

It is manifest that if every crime which resembles a crime depicted on television, in the movies, or in print can provide the basis for a civil suit by the victim against the media, then every report of crime, real or fictional, must be expunged or suppressed in the interest of economic survival. The media simply could not afford to defend themselves under such circumstances regardless of the merits of the case.

Publishers and broadcasters, and librarians too, do not exist to indemnify the victims of criminals who choose to copy conduct described or depicted in books, movies, and television.

Nor do they exist to engage in litigation with those victims. To make the media liable in damages for the "copycat" criminal is to compel comprehensive self-censorship.

Respondent suggests, at least by implication, that her theory of liability would be limited primarily to television presentations and then only to dramatic as opposed to news and informational materials.

We suggest that no such limitations are constitutionally permissible.

In today's world the "medium may be the message," but there is no authority recognizing the "medium as the measure" of First Amendment rights. The right of free speech is protected from infringement whether that right is exercised by newspapers, *New York Times* v. *Sullivan, supra,* 376 U. S. 254; by magazines, *Winters* v. *New York,* 333 U. S. 507 (1947); by radio, *Rosenbloom* v. *Metro Media, Inc.,* 403 U. S. 29 (1971); by motion picture, *Times Film Corp.* v. *City of Chicago,* 365 U. S. 43 (1961); or by television, *American Broadcasting Co.* v. *United States,* 110 F. Supp. 374, 389 (SD NY 1953) *aff'd., FCC* v. *American Broadcasting Co., Inc.,* 347 U. S. 284 (1953).

Moreover, the degree of protection afforded the various media of communication must be the same. The contention has been advanced that the greater the impact of the media used the greater should be the restrictions on First Amendment rights. Chief Justice Warren, dissenting in *Times Film Corp.* v. *Chicago, supra,* 365 U. S. 43, 77, answered this contention in the following words:

> ". . . But even if the impact of the motion picture is greater than that of other media, that fact constitutes no basis for the argument that motion pictures should be subject to greater suppression. This is the traditional argument made in the censor's behalf; this is the argument advanced against newspapers at the time of the invention of the printing press. The argument was ultimately rejected

> in England, and has been consistently held contrary to our Constitution." c.f. *Illinois Citizens Committee for Broadcast* v. *FCC*, 515 F. 2d 397, 421 (D. C. Cir. 1975)

To vary the degree of freedom of speech inversely with the impact of the medium used would produce the anomalous result that the man "who talks to himself" would be afforded the broadest protection under the First Amendment. Clearly, the protection of the right "to talk to one's self" is not the purpose of the First Amendment. On the contrary, if the purpose of the First Amendment is to promote debate on public issues which is ". . . uninhibited, robust, and wide-open . . ." *New York Times, supra,* 376 U. S. at 270, the purpose is best served by the medium with the greatest audience and impact.

Yet, the greater the audience, the greater the possibility that some psychologically imbalanced member of that audience will abuse, misuse, or pervert some thought, idea, or depiction. Thus, the "chilling effect" of Respondent's theory of liability increases directly with the effectiveness of the communications medium.

Likewise, it is not impossible for Respondent's theory of liability to apply to "fiction" but be inapplicable to "fact." Creative works as well as news and informational materials are equally protected by the First Amendment. As this Court noted in *Winters* v. *New York,* 333 U. S. 507, 510 (1947):

> "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine."

There is yet another way in which Respondent's theory of liability would operate to chill the exercise of First Amendment rights. Respondent's theory contemplates that the "sponsor" as well as the author, producer, and distributor of the offending work shall be held liable in damages.

However dedicated the author, producer, and distributor of a work to its dissemination, however committed they are to its defense as constitutionally protected, it would be rare to find the same degree of dedication and commitment in the sponsor. The stake of any individual advertiser in the sponsorship of any particular work is too limited to justify his acceptance of any significant risk arising out of its performance or content. It is far too easy to avoid such risk by sponsoring "safe programs."

But without sponsors, works will not be authored, produced, and distributed. By discouraging sponsorship, Respondent's theory of liability operates not merely to suppress creative works but to deny their creation at all.

The purposes of the First Amendment are not served by the over-subscription of *Winnie the Pooh* and *Goodie Two Shoes* at the expense of the themes and scenes of our times, however violent they may be.

III.

The Standard of Conduct Required by Respondent's Theory of Liability Is So Vague and Indefinite as To Be Constitutionally Impermissible.

Respondent seeks to establish here that the mere origination, production, distribution, and sponsorship of a creative work depicting violent or criminal behavior is a "negligent" act. To Respondent, the depiction of violence and crime, in and of itself and without reference to the context in which the depiction occurs, is sufficient to impose liability for any injury caused by any "copycat" criminal; *res ispa loquitor*.

The theory of liability advanced by Respondent is not new. It closely resembles that rationale used to justify the enactment of those statutes and ordinances which made it a crime to publish any work ". . . principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime . . ." *Winters* v. *New*

York, supra, 333 U. S. at 508. That rationale was "spelled out" by Mr. Justice Frankfurter in his dissent in the *Winters* case in these words:

> "Whereas, we believe that the destructive and adventurous potentialities of boys and adolescents, and of adults of weak character or those leading a drab existence are often stimulated by collections of pictures and stories of criminal deeds of bloodshed or lust so massed as to incite to violent and depraved crimes against the person; and
>
> "Whereas, we believe that such juveniles and other susceptible characters do in fact commit such crimes at least partly because incited to do so by such publications, the purpose of which is to exploit such susceptible characters; and
>
> "Whereas, such belief, even though not capable of statistical demonstration, is supported by our experience as well as by the opinions of some specialists qualified to express opinions regarding criminal psychology and not disproved by others; and
>
> "Whereas, in any event there is nothing of possible value to society in such publications, so that there is no gain to the State, whether in edification or enlightenment or amusement or good of any kind; and
>
> "Whereas, the possibility of harm by restricting free utterance through harmless publications is too remote and too negligible a consequence of dealing with the evil publications with which we are here concerned;
>
> "Be it therefore enacted that—" *Winters* v. *New York, supra,* 333 U. S. at 530.

But notwithstanding the rationale articulated by Justice Frankfurter, this Court held the New York statute which was the subject of the *Winters* case unconstitutional as "so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech . . ." *Id.* at 509. The *Winters* decision not only abrogated the New York statute in question, but struck down similar statutes in at least nineteen other states. *Id.* at 520, 522-523.

This Court was then, as it should be here, deeply concerned with the absence of any ascertainable standard of guilt. As was noted in this regard:

> "Even though all detective tales and treatises on criminology are not forbidden, and though publications made up of criminal deeds not characterized by bloodshed or lust are omitted, . . . *we think fair use of collections of pictures and stories would be interdicted* because of the utter impossibility of the actor or the trier to know where this new standard of guilt would draw the line between the allowable and the forbidden publications." *Winters* v. *New York, supra,* 333 U. S. at 519 [Emphasis supplied].

This Court went on to detail the specific defects of the "standard of guilt" as follows:

> "No intent or purpose is required—no indecency or obscenity in any sense heretofore known to the law. 'So massed as to incite to crime' can become meaningful only by concrete instances. This one example is not enough. The clause proposes to punish the printing and circulation of publications that courts or juries may think influence generally persons to commit crimes of violence against the person. No conspiracy to commit a crime is required." *Id.* at 519.

The decision in the *Winters* case is particularly significant in the consideration of Respondent's theory of liability here. In fundamental terms, Respondent is asking this Court to adopt by judicial fiat the very theory of liability which this Court precluded the legislatures of at least twenty states from adopting.

Moreover, Respondent is asking this Court to adopt a theory of liability applicable not merely to depictions "so massed as to incite crime" but also to every depiction of crime or violence, however isolated or limited in the context of the total work.

It is no answer to the *Winters* decision that it involved a criminal prosecution whereas this action involves a civil suit for damages.

> "The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. * * * These freedoms are delicate and vulnerable, as well as supremely precious in our society. *The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." National Assn. for the Advancement of Colored People* v. *Button,* 371 U. S. 415, 433 (1962) [Emphasis supplied].

As we have already noted, this Court is on record as recognizing the threat of damage awards as a form of sanction as effective in inhibiting the exercise of First Amendment rights as the threat of criminal prosecution. *New York Times Co., supra,* 376 U. S. at 277.

Limitations on First Amendment rights have been recognized by the Supreme Court. But whether such limitations have been labeled contempt, libel, obscenity, misrepresentation, slander, perjury, false advertising, solicitation of crime, or conspiracy, their nature and scope have been defined by standards that satisfy the First Amendment. *Id.* at 269.

No limitation on First Amendment rights heretofore recognized has involved the imposition of vicarious liability for utterances, oral, printed, or visual. Vicarious liability for the unintended and uncontrollable response of a third party to what is said, written, or shown, must necessarily result in comprehensive self-censorship.

"Intent" or "scienter" or "malice" is consistently required in cases involving First Amendment rights to avoid vicarious liability. The purposes of the *"scienter"* requirement were defined by the Supreme Court in *Mishkin* v. *State of New York,* 383 U. S. 502, 511 (1966) in the following terms:

> "The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material . . ."

It avoids this hazard, at least in one respect, by equating "responsibility" with "authority." Imposing liability on the perjurer for his false swearing; on the libeler for his libels; on the conspirator for his conspiracy; on the advertiser for his misrepresentations; at least makes the "doer" responsible for his "deeds."

The same cannot be said for imposing absolute liability for the response of a third party to the depiction or description of violence or crime. Such response would create a liability ". . . the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." *Winters* v. *New York, supra,* 333 U. S. at 519, quoting *U. S.* v. *Cohen Grocery Co.,* 255 U. S. 81, 89 (1921).

To avoid the hazard of self-censorship of constitutionally protected materials, it must be possible to avoid civil as well as criminal liability without suppressing such materials. To avoid liability it must therefore be possible to identify materials which are not constitutionally protected.

This means that Respondent's theory of liability requires either

1. That all materials depicting violence and crime, in any form and under any circumstances, be deprived of any guarantees of the First Amendment; or

2. That any materials depicting violence and crime which evoke criminal behavior in another be unprotected and properly the subject of suppression.

The *Winters* case forecloses absolutely any consideration of the first proposition.

On the other hand, the alternative would mean that the works entitled to constitutional protection could not be identified until the response to them is known and it is too late to avoid liability. A standard which requires knowledge of the effect of a work in order to determine whether it is constitutionally protected is a standard which not only encourages self-

censorship but absolutely compels it as the only alternative to unforeseeable and uncontrollable litigation and liability.

IV.

The Decision of the Court of Appeal Compels Comprehensive Self-Censorship.

If, as the decision of the Court of Appeal holds, there must be a jury trial before the trial judge may consider whether or not the work is constitutionally protected, then the exercise of First Amendment rights has been effectively limited if it has not been abrogated altogether.

The mere cost of preparing a defense is a significant deterrent to dissemination and distribution. This is particularly true in the case of works distributed by libraries where there is no prospect of profit or income from which defense costs may be defrayed.

Confronted with a suit of the type involved here, the response of libraries, schools, and other distributors of works is wholly predictible—

> First, they would accept settlement of the suit at any sum less than their cost of defense; and
>
> Second, they would limit the works they distribute to those which are "safe" so as to avoid further litigation.

Thus, the effect of the procedure mandated by the decision of the Court of Appeal will be comprehensive self-censorship of constitutionally protected works in the interest of economic survival.

V.

The Decision of the Court of Appeal Is Properly Reviewable by This Court at This Time.

Amicus ALA adopts as its own the arguments and authorities set forth in Petitioners' Statement of Reasons for Granting the Writ of Certiorari at this time rather than after further proceedings.

Such reasons are consistent with and in amplification of Amicus' contention that the essence of the evil in Respondent's theory of liability is the "chilling effect" of "further proceedings." The rule of law is ill-served when it is made an instrument of legalized harassment, coercion, and oppression. Yet this is precisely the consequence of requiring a full trial of a contention barred by the First Amendment.

VI.

Conclusion.

Librarians and libraries would be the last to deny the force of an idea; the influence of an image, and the power of a picture. They exist to preserve such force, influence, and power so that man may use them.

Nor would librarians or libraries deny that such force, influence, and power as are available in the words and pictures they disseminate can be abused and misused. They would agree with President Madison that:

> "Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press." 4 Elliott's Debates on the Federal Constitution (1876) p. 571

And yet, silence coerced by law is the argument of force in its worst form. *Whitney* v. *California, supra,* 274 U. S. at 376. And the "argument of force" is tyranny.

Librarians abhor violence and crime. But to abhor it does not permit it to be ignored as a part of life or as a part of literature.

Amicus respectfully submits that this Honorable Court should grant Petitioners' Request for a Writ of Certiorari.

Respectfully submitted,

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